

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant alleges accidental injury on October 29, 1993 and through February 7, 1994 to her right upper extremity and body. Respondent defends contending claimant has suffered injury to her right upper extremity, including her shoulder with no involvement to the body, citing K.S.A. 44-510d as the basis for any award to which claimant would be entitled.

On the date alleged claimant experienced an onset of pain in her right upper extremity and shoulder with pain under her arm and along her rib cage on the right side while stocking shelves for respondent. Claimant was provided medical care with Dr. Robert L. Eyster, an orthopedic surgeon, who ultimately diagnosed muscle strain, opined claimant had suffered no permanent impairment and needed no restrictions to her ability to return to work. Claimant was also examined by Dr. Anthony Pollock who, while agreeing claimant had no functional impairment, did place specific restrictions upon claimant's ability to return to work.

Claimant was referred to Dr. Lawrence R. Blaty for an examination at the request of claimant's attorney. Dr. Blaty diagnosed myofascial pain syndrome to claimant's upper extremity, including the right shoulder and assessed claimant an eight percent (8%) functional impairment to the right upper extremity which converted to a five percent (5%) whole body impairment.

K.S.A. 44-510d(a)(13) awards functional impairment on a scheduled injury basis to an employee for 225 weeks "for the loss of an arm, including the shoulder joint, shoulder girdle, shoulder musculature or any other shoulder structures."

Claimant's entitlement to an award in this matter to a large degree hinges upon the medical testimony of Dr. Blaty. If the Appeals Board finds the impairment by Dr. Blaty to include the trunk of claimant's body, then claimant would be entitled to a whole body impairment and a work disability. If, on the other hand, the Appeals Board finds the evidence supports a finding that claimant's impairment is to the right upper extremity and shoulder only, then claimant's right to an award would be controlled by K.S.A. 44-510d. Two Appellate decisions stand out with regard to the situs of an impairment. In Fogle v. Sedgwick County, 9 Kan. App. 2d 129, 131, 673 P.2d 465 (1983); aff'd, 235 Kan. 386, 680 P.2d 287 (1984), the Kansas Court of Appeals held that:

"The situs of physical injury, that is, damage to the body, which manifests itself solely as functional disability of a body member enumerated in the scheduled injury section of the Workmen's Compensation Act is immaterial in ascertaining recoverable compensation." *Id.* at Syl. ¶ 1.

The Court of Appeals was asked to answer the question as to whether workers compensation for permanent partial general disability is recoverable for partial loss of use of the arm as the sole manifestation of an injury to a situs other than the arm. The Court of Appeals, in that instance, elected to not award compensation to the body as a whole but rather to the situs of the manifestation of the injury.

Likewise, in Bryant v. Excel Corp., 239 Kan. 688, 722 P.2d 579 (1986), the Supreme Court was asked to decide the situs of the resulting disability which was not the situs of the injury. In Bryant the Supreme Court found, in following Fogle, that it is not the manifestation of the injury which controls, but instead the situs of the resulting disability. *Id.* at 692. In Bryant claimant suffered an injury to her elbow with no physical damage higher than the elbow region. There was referred pain, caused by nerve involvement in the elbow, into the claimant's shoulder which had a direct effect upon claimant's ability to use the shoulder. The Court granted benefits to claimant based upon a whole body permanent impairment rather than a scheduled injury.

The Appeals Board must look to the medical evidence to decide the situs of the resulting disability. Neither Dr. Pollock nor Dr. Eyster awarded claimant any functional impairment as a result of this injury. Only Dr. Blaty found claimant to have a functional impairment as a result of the injuries suffered with respondent. In reviewing the medical testimony of Dr. Blaty it is significant that when discussing the eight percent (8%) functional impairment to claimant's upper extremity, Dr. Blaty was asked specifically if his rating included claimant's shoulder joint, shoulder girdle, shoulder musculature or other shoulder structure. He answered in the affirmative. Although Dr. Blaty testified that claimant had tenderness in the rib area, he also acknowledged that under the American Medical Association's Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), there was no impairment to claimant's rib area.

The Appeals Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991). The Appeals Board finds, in this instance, the situs of claimant's disability is to the right upper extremity and shoulder and does not extend into the trunk of the body. As such, claimant's entitlement to benefits is controlled by K.S.A. 44-510d as a scheduled injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated September 7, 1995, shall be, and is herein, affirmed and claimant is granted an award against respondent, Hobby Lobby Stores, Inc., and its insurance carrier, Wausau Insurance Company, for an injury suffered on October 29, 1993 for 19.43 weeks temporary total disability compensation at the rate of \$107.27 per week in the sum of \$2,084.26, followed thereafter by 3 weeks temporary partial disability compensation at the rate of \$37.11 per week in the sum of \$111.33 which shall be converted and combined with temporary total to represent a total of 20.47 weeks of temporary total disability compensation due and owing to claimant. Thereafter, claimant is entitled to compensation based upon a schedule of 225 weeks, when reduced by 20.47 weeks temporary total disability compensation and multiplied times the 8% functional impairment, results in an award of 16.36 weeks permanent partial disability on a scheduled basis at the rate of \$107.27 per week, for a total award of \$3,950.53, all of which is due and owing at this time minus any amounts previously paid.

Claimant is awarded future medical benefits upon application to and approval by the Director.

Unauthorized medical expense of up to \$500.00 is ordered paid to or on behalf of the claimant upon presentation of an itemized statement verifying same.

Claimant's contract of attorney fees is herein approved insofar as it is not in contravention to K.S.A. 44-536.

Fees necessary to defray the expense of the administration of the Kansas Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Deposition Services Transcript of Regular Hearing	\$136.90
Ireland Court Reporters Deposition of Jerry D. Hardin	\$196.30
Deposition of Lawrence R. Blaty, M.D.	\$230.30
Deposition of Gail Duarte	\$249.20
Deposition of Bobby Lynch	\$ 86.40
Court Reporting Service Deposition of Anthony G. A. Pollock, M.D.	\$ 71.50
Deposition of Karen Crist Terrill	\$161.80
Barber & Associates Deposition of Robert Lynch	\$162.00
Deposition of Robert L. Eyster, M.D.	\$104.00

IT IS SO ORDERED.

Dated this ____ day of February 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, Kansas
Jeffery R. Brewer, Wichita, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director